IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON
February 19, 2003 Session

MARK B. GARDNER v. UNIVERSITY OF MEMPHIS COLLEGE OF BUSINESS, ET AL.

Direct Appeal from the Tennessee Claims Commission
No. 20001895 Randy Camp, Commissioner

No. W2002-01417-COA-R3-CV - Filed April 8, 2003

The plaintiff in this case filed a claim in the Tennessee Claims Commission alleging breach of contract by the University of Memphis College of Business and Tennessee Board of Regents. The Claims Commission dismissed for lack of subject matter jurisdiction under Tenn. Code Ann. § 9-8-307(a)(1)(L). We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Claims Commission Affirmed

DAVID R. FARMER, J., delivered the opinion of the court, in which ALAN E. HIGHERS and HOLLY K. LILLARD, J.J., joined.

John M. Moore, Memphis, Tennessee, for the appellant, Mark B. Gardner.

Paul G. Summers, Attorney General and Reporter and Kae Carpenter Todd, Assistant Attorney General, for the State of Tennessee.

OPINION

The facts relevant to this appeal are undisputed. Plaintiff Mark Gardner (Mr. Gardner) began a Ph.D. program at the Fogelman College of Business and Economics ("Fogelman College") at the University of Memphis ("the University") in 1993. In January 1996, he failed the Microeconomics section of his comprehensive examination in his area of concentration. The Microeconomics section was one of four sections of the exam. Mr. Gardner was advised that he would have to re-take the section in order to pass the examination, which was required for successful completion of the Ph.D. program. Mr. Gardner refused to re-take the failed section, and appealed this determination to the Graduate Grade Appeals Committee and up through the University of Memphis system. He further appealed to the Tennessee Board of Regents, which denied the appeal. Mr. Gardner then filed a complaint with the Tennessee Claims Commission, alleging breach of contract by the University.

Mr. Gardner contends that upon entering the University as a Ph.D. candidate in 1993, he was advised that his program would be governed by the Ph.D. Handbook prepared by Fogelman College for the 1993-94 year. He submits that this handbook provided that he would be required to pass two written comprehensive examinations, one in his minor area and one in his area of concentration. He further asserts that faculty Ph.D. coordinators advised him that, although the exam in his area of concentration would involve separate sections covering different areas of study, the sections would be regarded as part of one exam. Accordingly, his total performance on all sections would determine whether he passed the entire exam. Mr. Gardner contends that "it was impossible to determine how the failing grade on the Microeconomics I and II sections could have lowered his scores on the total examination below a passing grade."

Mr. Gardner filed a breach of contract action against the state pursuant to Tenn. Code Ann. § 9-8-307(a)(1)(L). This section provides that claims may be brought against the state for "breach of a written contract between the claimant and the state which was executed by one (1) or more state officers . . . with authority to execute the contract[.]" Mr. Gardner argues that the University's 1993-94 Graduate Catalogue, the Fogelman College's Ph.D. Handbook for the 1993-94 year, and the Tennessee Board of Regents Policy 1:02:11:00 constitute a contract within the meaning of the statute. He alleges that the University breached this contract by failing to follow the policies therein. The Claims Commission dismissed Mr. Gardner's claim in May 2002, finding no contract over which it had subject matter jurisdiction pursuant to Tenn. Code Ann. § 9-8-307(a)(1)(L). Mr. Gardner filed a timely appeal to this Court.

Issue Presented

Mr. Gardner presents the following issue, as we perceive it, for review by this Court:

> Whether the Claims Commission erred in dismissing the cause for lack of subject matter jurisdiction based on a finding that there was no express written contract over which it has jurisdiction pursuant to Tenn. Code Ann. § 9-8-307(a)(1)(L).

Standard of Review

The Claims Commission characterized its order as one granting the State's motion to dismiss. However, since matters outside the pleadings were considered by the Commission, we will treat it as an award of summary judgment. Summary judgment should be awarded when the moving party can demonstrate that there are no disputed issues of material fact and that it is entitled to judgment as a matter of law. Tenn. R. Civ. P. 56.04; ***Byrd v. Hall***, 847 S.W.2d 208, 214 (Tenn. 1993). The moving party must affirmatively negate an essential element of the non-moving party's claim, or establish conclusively an affirmative defense. ***McCarley v. West Quality Food Serv.***, 960 S.W.2d 585, 588 (Tenn. 1998).

When the moving party makes a properly supported motion for summary judgment, the burden shifts to the non-moving party to establish the existence of disputed material facts. ***Id.*** Mere

assertions that the non-moving party has no evidence does not suffice to entitle the moving party to summary judgment. ***Id.*** In determining whether to award summary judgment, the court must view the evidence in the light most favorable to the non-moving party, drawing all reasonable inferences in favor of the non-moving party. ***Staples v. CBL & Assoc.***, 15 S.W.3d 83, 89 (Tenn. 2000). Summary judgment should be awarded only when a reasonable person could reach only one conclusion based on the facts and inferences drawn from those facts. ***Id.*** If there is any doubt about whether a genuine issue exists, summary judgment should not be awarded. ***McCarley***, 960 S.W.2d at 588. Since this determination is an issue of law, we review an award of summary judgment ***de novo***, with no presumption of correctness afforded to the trial court. ***Guy v. Mutual of Omaha Ins. Co.***, 79 S.W.3d 528, 534 (Tenn. 2002).

Discussion

The underlying facts pertinent to this appeal are undisputed. The only issue before this Court is whether Mr. Gardner's application for admission and acceptance letters, the University's Graduate Catalogue, the Fogelman College's Ph.D. Handbook for the 1993-94 year, the Tennessee Board of Regents Policies, and the University's class schedule for the spring of 1999 constitute a contract within the meaning of the Tennessee Code. The Code provides that actions may be maintained against the state for "breach of a written contract between the claimant and the state which was executed by one (1) or more state officers . . . with authority to execute the contract[.]" Tenn. Code Ann. § 9-8-307(a)(1)(L)(1999). We hold that the documents proffered by Mr. Gardner do not constitute a contract within the meaning of Tenn. Code Ann. § 9-8-307(a)(1)(L).

The University Catalogue at issue here contains a disclaimer that it "is not intended to state contractual terms and does not constitute a contract between the student and the institution." This Court recently addressed the question of whether such language contained in a university catalogue effectively precludes a claim that the catalogue can be construed as a contract. ***See Ku v. State of Tennessee***, No. E2002-01076-COA-R3-CV, 2002 WL 31830636 (Tenn. Ct. App. Dec. 17, 2002) (***perm. app. pending***); and ***Petty v. State of Tennessee***, No. E2001-02124-COA-R3-CV, 2002 WL 415650 (Tenn. Ct. App. March 18, 2002) (***no perm. app. filed***). We held that such disclaimers preclude the finding of a contract under Tenn. Code Ann. § 9-8-307(a)(1)(L). ***Ku***, 2002 WL 31830636 at *4-6; ***Petty***, 2002 WL 415650 at *1. Moreover, although, as Mr. Gardner asserts, such catalogues are implicitly approved by a state official with authority to execute a contract, they do not meet the provision of the statute that the contract be both written and signed. ***See Ku***, 2002 WL 31830636 at *4.

The Ph.D. Handbook likewise is unsigned, and cannot be considered an executed contract within the meaning of § 9-8-307(a)(1)(L). Further, Mr. Gardner offers no evidence of language in the Handbook which would evidence the University's intent to be bound by its contents. ***See id.*** at

*5 FN. Mr. Gardner does not state why the University's class schedule should be considered a signed contract for the purposes to this appeal, and we find no reason to consider it as such.[1]

The Tennessee Board of Regents' policies to which Mr. Gardner refers the Court address appeals and appearances before the board. Mr. Gardner contends that since the Board of Regents is created by state statute, and since the policies promulgated by the Board are adopted pursuant to authority granted by state law, "[n]ot only do they carry the [weight] of contract, but also binding state rules of procedures." We disagree that these procedural rules constitute a signed contract for the purpose of maintaining a breach of contract action against the state pursuant to § 9-8-307(a)(1)(L). Insofar as Mr. Gardner's application for admission and acceptance letters can be construed as a contract, the terms of this contract were fulfilled when Mr. Gardner began his Ph.D. program in 1993, and do not provide a basis for the current action. ***See id.***

The sum of Mr. Gardner's argument, as we perceive it, is that construed together, the catalogue and handbook set out an agreement between the University and student to which the University is bound. This argument must fail for two reasons. First, neither publication indicates an intent by the state to be bound by its contents. To be enforceable, a contract "must result from a meeting of the minds of the parties in mutual assent to [its] terms." ***Petty***, 2002 WL 415650 at *2 (quoting ***Johnson v. Central Nat'l Ins. Co.***, 356 S.W.2d 277, 281 (Tenn. 1962)). Second, the statute providing for a cause of action against the state for breach of contract requires that "the contract [be] executed by one or more state officers with authority to execute the contract." Tenn. Code Ann. § 9-8-307(a)(1)(L). As discussed above, none of the documents relied on by Mr. Gardner constitute a signed contract. Considering them in conjunction and together with other documents and policies does nothing to change their nature. ***See id.***

Conclusion

In light of the foregoing, we affirm the judgment of the Claims Commission dismissing the action for lack of subject matter jurisdiction under Tenn. Code Ann. § 9-8-307(a)(1)(L). Costs of this appeal are taxed to Mark B. Gardner, and his surety, for which execution may issue if necessary.

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DAVID R. FARMER, JUDGE

[1]The trial court noted that the policies set forth in the schedule of classes pertaining to harassment or unacceptable work or educational environment also provided a written procedure for reporting and investigating such complaints. The trial court found no proof that these procedures were initiated by Mr. Gardner before the claim was filed in the Claims Commission. This determination has not been appealed to this Court.